John Randolph Tucker, we find this admirable portraiture of Judge Brockenbrough:

"Judge John W. Brockenbrough was, in learning and native ability, entitled to a foremost place in the ranks of the profession. He had been a profound student of law all his life, was patient and thorough in preparation and vigorous and impressive in argument. As a teacher he was conspicuous for thorough and sound instruction. As a lawyer, judge, and man, he had a notable personality as a brave and honorable gentleman, and a devoted patriot to his mother Commonwealth."

Those whose privilege it was to have such a man as this as their preceptor, came fully within the influence of his exalted character. In the little community of which he was the head, there reigned mutual respect and esteem; nothing mean or low could exist in such an atmosphere. His relation to his students was that of a father to his children. He took the greatest interest in their progress and success, and his solicitude for their welfare followed them into after-life, and only ended with his death. Under these circumstances, it is not wonderful that they felt for him the utmost devotion, and not only honored him as a teacher, but loved him as a friend. And when they read these lines, and recall his gracious presence and kindly words, his lofty character and high endowments, they will feel that in this imperfect sketch the half of good of him has not been told, and will exclaim:

"This was the noblest Roman of them all!
. . . . .
His life was gentle, and the elements
So mixed in him, that Nature might stand up,
And say to all the world, *This was a man!*"

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TRUSTS AND MONOPOLIES—REPLY.

In the February number of THE VIRGINIA LAW REGISTER, 1896, Mr. Jackson Guy has given us an able and interesting review of the decisions affecting the Anti-Monopoly Act of Congress passed July 2, 1890. The only decision so far, by the court of last resort, construing this act, is the case of *The United States v. E. C. Knight Co.*, 156 U. S. 1.

Mr. Guy discusses this case very fully, and comes to the conclusion that the better opinion is that of the dissenting Judge. I do not think

so, and will, as briefly as I can, try to present some reasons why it seems to me that no decision of this great court is sounder in principle or likely to be more beneficent in its results. Indeed, it is hardly too much to say that it would have been a grievous blow to popular liberty, if the majority of the court had taken the view of Mr. Justice Harlan. Any one familiar with the opinions of Mr. Justice Harlan since his elevation to the bench of the Supreme Court of the United States, while conceding his conspicious abilities as a judge, must have been impressed with his leaning to extreme Federal views on constitutional questions. He is ever eager to follow Marshall and Story in that which constitutes the only shadow (if so strong a word may be used) upon their splendid judicial record, a too great readiness to enlarge the powers of the general government by construction. Any opinion of Mr. Justice Harlan upon a question involving the reserved rights of the States must be taken *cum grano salis*. The Constitution of the United States gives Congress the power "to regulate commerce with foreign nations and among the several States and with the Indian Tribes." Congress has no power to interfere with the interior trade of the people of the States, nor has it any power to suppress monopolies as such within the States.

Chief Justice Fuller, in delivering the opinion of the court, well says: "It was in the light of well settled principles that the Act of July 2, 1890, was framed. Congress did not attempt thereby to assert the power to deal with monopoly directly as such; or to limit or restrict the rights of corporations created by the States or the citizens of the States in the acquisition, control or disposition of property; or to regulate or prescribe the price or prices at which such property should be sold; or to make criminal the acts of persons in the acquisition and control of property which the States of their residence or creation sanctioned or permitted." Many of the cases cited by Mr. Guy and also by Mr. Justice Harlan show the power of the several States to deal with monopolies; but they have no bearing at all upon the power of Congress to suppress monopolies within the States, except so far as they undertake to give the proper interpretation of the word "commerce" as used in the Constitution. Mr. Justice Harlan cites authorities to show that "commerce" includes the idea "of the buying, selling and interchange, as well as of the transportation of commodities." That may be true, but certainly there can be no interstate commerce without transportation. Transportation is an essential, if not the dominant idea in such commerce. The mere fact that the

American Sugar Refining Company, by purchasing the stock of other similar companies, created a monopoly in the manufacture of sugar, though such purchase might indirectly affect commerce, would not necessarily authorize the general government to undertake to deal with such monopoly. Chief Justice Fuller says: "Commerce succeeds to manufacture and is not a part of it. The power to regulate commerce is the power to prescribe the rule by which commerce shall be governed and is a power independent of the power to suppress monopoly. But it may operate in suppression of monopoly whenever that comes within the rules by which commerce is governed, or whenever the transportation is itself a monopoly of commerce," and again, "that which belongs to commerce is within the jurisdiction of the United States, but that which does not belong to commerce is within the jurisdiction of the police power of the State."

The distinction made by the court in the course of its opinion, between a direct interference with external commerce and that which may affect it indirectly, is a very important and necessary one and is fully authorized by the current of decisions. It has been held by the Supreme Court of the United States that the several States may do many things which indirectly affect external commerce; for instance, they may make regulations relating to canals, turnpikes, roads and ferries; they may impose licenses to sell goods; they may refuse to allow certain articles to be manufactured within their borders for export; they may pass quarantine and inspection laws. Such laws would not be void unless they directly conflicted with some regulation of commerce established by the general government.

It would of course be impossible to enumerate everything included in the power given to Congress to regulate commerce, but the suppression of monopolies as such within the States cannot reasonably be included among the things which Congress may do. A reasonable construction must be given to this grant or delegation of power to Congress. Every great constitutional question must be considered historically. We must go back at least as far as the convention which framed the Constitution. In judging of the extent of a delegated power, we must consider the reasons for it, the mischief to be provided against, the end to be attained, and the parties making the grant.

Mr. Madison, in his "Introduction to the Debates on the Constitution," says "the want of authority in Congress to regulate commerce had produced in foreign nations, particularly Great Britain, a monopolizing policy injurious to the trade of the United States and destructive

of their navigation. The want of a general power over commerce had led to an exercise of the power separately by the States which not only proved abortive, but engendered rival, conflicting and angry regulations. . . . . The States having ports for foreign commerce, taxed and irritated the States trading through them."

Edmund Randolph, when the Convention assembled, in outlining the business before it, said that "there were advantages which the United States might acquire, which were not attainable under the Confederation—such as a productive impost, counteraction of the commercial regulations of other nations, pushing commerce *ad libitum*," &c.

Duer, in his work on the Constitution, speaking of the power to regulate commerce, says "a very material object of the power was to secure those States which import or export through other States from unjust contributions levied on them by the latter."

Under the Confederation, the States had the power to tax the imports and exports (passing through them) of their neighbors. Congress might make commercial regulations, but it had no power to enforce them. The great object was to establish uniformity in commercial regulations and to protect the States against the injurious and monopolizing policy of foreign nations. Under these circumstances, States that were free, independent and sovereign, delegated to Congress the power "to regulate commerce with foreign nations and among the several States." The States did not derive their sovereignty from the Constitution, and never proposed to surrender it. They never proposed to surrender to the general government that unlimited jurisdiction over all persons and things within their territory, which is of the essence of sovereignty. Upon the recommendation of several of the State conventions, it was provided by the 10th Amendment to the Constitution that "the powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively or to the people." Virginia's act of ratification leaves no room for doubt as to how she regarded the powers delegated to the general government.

Judge Tucker, in his edition of Blackstone's Commentaries, says of the Constitution, "the powers delegated to the Federal Government are in all cases to receive the most strict construction that the instrument will bear, where the right of a State or of the people, either collectively or individually, may be drawn in question." In the light of the debates on the powers delegated to the general government and

in the light of history, I submit that this proposition is a very sound one, though not in exact accordance with all the utterances on the subject of Marshall and Story. It is well known that in the convention to frame the Constitution, repeated efforts were made by the advocates of a strong government to give the general government some power to overrule or veto the acts of the States, and that all such propositions were rejected.

Very early in the history of the Convention a dispute arose as to the true nature and character of the government to be established. Two competing theories produced two parties. One party favored a strong national government, the other party insisted on reserving the great bulk of power in the States, and though in the Constitution, as framed, the views of the State Rights party prevailed and the reserved rights of the States were thought to be sufficiently protected, yet the control of the government was at the time in the hands of men who believed in a strong national government, and who naturally sought to give it an impulse in that direction. We find in the first Congress after the adoption of the Constitution, that constructions of the instrument are adopted and measures are passed, tending to strengthen and enlarge the powers of the general government; and it is not too much to say that the Supreme Court, through its great powers under section 25 of the Judiciary Act of 1789, became an agent in promoting the views of the friends of a strong national government, though upon the whole moderate and conservative in the exercise of the vast authority conferred upon it.

The great advocate of a strong government was General Hamilton, and he was supported by Mr. Madison until the enactment by the national party of the Alien and Sedition laws, when he became alarmed; he saw that the general government was usurping powers dangerous to the liberties of the people, and he became the able ally of Mr. Jefferson, the great apostle of State Rights.

General Hamilton and the other leaders of the national party were no doubt honest and patriotic, and they saw in a strong national government the best safeguard against the evils that seemed to them to threaten the young republic; but time has shown that they were mistaken in the character of the dangers by which the country was threatened; they seemed to have anticipated the dangers arising from the conduct of foreign nations. They anticipated the danger of the States becoming too powerful for the general government. They anticipated the danger that the larger and more powerful States would oppress the

smaller and weaker States. They do not seem to have foreseen or appreciated the danger that differences in domestic institutions, industries and economic interests, might array great sections of the country against each other, and that the stronger section, stronger in population and resources, might use all its reserved powers (as States) and all the delegated powers of the general government for the oppression of the weaker section.

Mr. Jefferson's keen political vision foresaw the dangers to popular liberty from the growth of the national party, and later on in our history the great Calhoun, almost with prophetic forecast, portrayed the "Iliad of Woes" that would result to the country from the growing concentration of power in the Federal Goverment. He foretold that the result would be to place the control of the government in the hands of a sectional party: that one section of the country would be arrayed against the other; that the weaker section would be forced to submit to a state of vassalage or appeal to the arbitrament of the sword.

Time has demonstrated that the worst apprehensions of Mr. Calhoun were fully justified. Strained constructions of the powers delegated to the general government and a departure from the State Rights views which prevailed in the framing and adoption of the Constitution, and which, in theory, at least, were fully recognized for many years thereafter, involved the country in the greatest war of modern times and carried the government very far from its ancient moorings. There was very great danger that this departure might become fixed and permanent, and that the sovereignty of the States, the great bulwark and palladium of popular liberty, had received a fatal blow; but, happily, indications of a revulsion in public sentiment soon began to manifest themselves; hope sprang up in many patriotic hearts that all was not lost; wise and thoughtful men all over the land saw that the only security for popular rights, for the continued prosperity and happiness of the country, was in restricting the powers of the general government within narrower limits and in preserving the autonomy of the States; and in the pathway of a return to the safer and more conservative views of Jefferson, Madison and Calhoun, I hail the recent decision of the Supreme Court of the United States as a beacon light. I am aware that Justice Harlan, in his dissenting opinion, professes no hostility to State Rights, and even thinks that the people of the States would be protected and benefited by the proposed judicial interference with their domestic concerns.

"*Timeo Danaos et dona ferentes.*"

The provision of the Constitution giving to Congress the power "to regulate commerce with foreign nations and among the several States" is necessarily left somewhat vague and general in its terms, but when we consider the reasons for the provision and the character of the parties making this delegation of power, we cannot suppose that the States adopting the Federal Constitution ever intended to confer upon Congress the almost unlimited power of interference with their domestic concerns, which would seem to be the necessary result of Justice Harlan's construction. If the Federal courts have the right to suppress monopolies as such within the States, they of course have the right to decide what are monopolies. Every branch of human industry may be the subject of commerce; every kind of manufacture and industry within the States, though sanctioned and protected by State laws and necessary to the welfare of the people of the States where they exist, may be drawn within the jurisdiction of the Federal courts and suppressed as monopolies. In this connection I cannot do better than quote the language of Mr. Justice Lamar, in *Kidd v. Pearson*, 128 U. S. 20: "No distinction is more popular to the common mind or more clearly expressed in economic and political literature than that between manufacture and commerce. Manufacture is transformation, the fashioning of raw material into a change of form for use. The functions of commerce are different. The buying and selling and the transportation incidental thereto constitute commerce, and the regulation of commerce, in the constitutional sense, embraces the regulation, at least, of such transportation. . . . . If it be held that the term includes the regulation of all such manufactures as are intended to be the subject of commercial transactions in the future, it is impossible to deny that it would also include all productive industries that contemplate the same thing. The result would be that Congress would be invested, to the exclusion of the States, with the power to regulate not only manufactures, but also agriculture, horticulture, stock-raising, domestic fisheries, mining—in short, every branch of human industry. For, is there one of them that does not contemplate more or less clearly an interstate or foreign market?" I will not cite more of this opinion, as it would take up too much space, but I call particular attention to it as a complete answer to the views of Justice Harlan in his dissenting opinion in *United States v. E. C. Knight Co.*

The creation of giant monopolies, particularly in the necessaries of life, may be a great evil, but I think they must be dealt with by the States where they exist, and not by the general government. Congress

may render great aid to the States by repealing laws which favor the establishment of monopolies.

Nothing has done so much to favor the creation of monopolies as the high protective tariff system which has been the policy of this government for so many years. The lowest possible tariff, consistent with the economical administration of the government, is a most important step in the direction of breaking down monopolies.

It is far wiser and safer to seek to establish a condition of things unfavorable to the growth of monopolies than to try to suppress them by governmental interference, State or Federal. It is not always an easy thing to say what is a monopoly, nor is it an easy thing to determine when or how far a State may wisely use its power to suppress it. But whatever may be the power of the State or the reasons for its exercise in the particular case, we cannot too jealously watch any interference upon the part of the general government; "and acknowledged evils, however grave and urgent they may appear to be, had better be borne, than the risk be run, in the effort to suppress them, of more serious consequences by resort to expedients of even doubtful constitutionality."

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HOMESTEAD EXEMPTION.

The word "Homestead," in its usual legal signification, means the house and curtilage set apart for a family residence, and exempt from forced sale for the debts of the householder. Art. XI, sec. 1, of the Constitution of Virginia provides for an *exemption* of real and personal property of a householder or head of a family, to an amount not exceeding $2,000; and sec. 5 of Art. XI provides that "the General Assembly *shall*, at its first session under this Constitution, prescribe in what manner and on what conditions the said householder or head of a family shall thereafter set apart and hold for himself and family a homestead out of any property hereby exempted, and *may, in its discretion*, determine in what manner and on what conditions he may thereafter hold, for the benefit of himself and family, such personal property as he may have, and coming within the exemption hereby made." (Italics mine).